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*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 24th March, 2023

+   O.M.P. (COMM) 212/2018 & I.A. 6847/2018

INOX AIR PRODUCTS PRIVATE LIMITED ....Petitioner
Through: Mr. Jayant Bhushan, Senior Advocate with Mr. Joseph Pookkatt, Mr. Dhawesh Pahuja and Mr. Vaibhav Dwivedi, Advocates.

versus

AIR LIQUIDE NORTH INDIA PRIVATE LIMITED ....Respondent
Through: Mr. Akhil Sibal, Senior Advocate with Mr. Gaurav Gupta, Mr. Samyak Gangwal, Ms. Eesha Bakshi, Ms. Deboshree Mukherjee and Ms. Bahuli Sharma, Advocates.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

I.A. 1606/2019 (*Application by the respondent under Section 34(4) of the Arbitration and Conciliation Act, 1996*)

1. By way of this application, the respondent in O.M.P(COMM.) 212/2018, Air Liquide North India Private Limited, invokes Section 34(4) of the Arbitration and Conciliation Act, 1996 ["the Act"] to seek

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an adjournment for a fixed period of time, in order to give the Arbitral Tribunal an opportunity to resume the arbitration proceedings to eliminate the ground for setting aside the arbitral award, relating to non-consideration of the petitioner's documents.

A. *Facts*

2. The facts in which the application has been filed are as follows:-

A. The parties entered into a Sales and Purchase Agreement dated 14.12.2009/19.12.2009, whereunder the respondent was to supply Liquid Oxygen and Liquid Nitrogen to the petitioner.

B. Disputes arose between the parties and an arbitrator was appointed by this Court *vide* order dated 21.01.2015 in ARB. P. 410/2013. The respondent raised various claims before the learned arbitrator, including claims of ₹41,73,747/- under a debit note dated 11.08.2011/16.08.2011 and a claim of ₹1,87,62,502/- under a debit note dated 07.11.2012/19.10.2012 with interest thereupon. The petitioner disputed those claims and also filed a counter-claim of ₹5,39,79,500/-.

C. During the course of proceedings before the learned arbitrator, the petitioner sought to file documents enumerated as Annexures A-1 to A-60.[1] The documents were taken on record by an order of the learned arbitrator dated 05.12.2015, subject to payment of costs.[2] The learned arbitrator further recorded that

[1] Annexure 26(colly) of the petitioner's list of documents.
[2] Annexure 25(colly) of the petitioner's list of documents.

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the documents in any case would have to be proved in accordance with law.

D. Affidavits of evidence were filed by the parties and recording of the statement of the claimant's [respondent herein] witness commenced. At this stage, the learned arbitrator passed the following order on 25.01.2016[3]: **-**

> *"The Tribunal had started recording the statement of the Claimant's witness.* ***However, after some cross examination, it was agreed between the parties that there is no need of recording any oral evidence and the matter can straight away be fixed for arguments. It is also agreed that whatever oral evidence was recorded today will not be read.***
> *While fixing dates, it was noticed that the venue at the Delhi International Arbitration Centre is not available till middle of March-2016. Parties, therefore, agreed that matter may be fixed for arguments in the office of Arbitral Tribunal.*
> *In view of the above, the matter will come up for arguments on 25.02.2016 at 3PM, 29.02.2016 at 5PM and on 03.03.2016 at 3PM for arguments in the office of the Arbitral Tribunal at A-27, Defence Colony, New Delhi.* ***The E-mails placed on record by the parties will be read without any formal proof.*** *It will be appreciated if the parties file a brief synopsis of their respective case at least three days before the date fixed for arguments."*[4]

E. The learned arbitrator unfortunately passed away, following which this Court appointed a substitute arbitrator by order dated 25.05.2017 in O.M.P.(T)(COMM.) 19/2017.

F. The learned arbitrator formulated eight issues for his consideration, of which issue No. 4 is reproduced below[5]: **-**

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[3] Annexure 28 of the petitioner's list of documents.
[4] Emphasis supplied.
[5] Page 8 of the award in annexure-1 of the petitioner's list of documents.

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> *"4. Whether the Respondent proves that the Claimant by price under cutting and soliciting clients was in fundamental breach of the contract between the parties."*

G. After hearing the parties, the learned arbitrator passed the impugned award dated 02.02.2018, by which a sum of ₹2,29,36,249/- has been awarded in favour of the respondent herein, alongwith interest and costs.

3. One of the grounds of challenge raised by the petitioner herein pertains to the failure of the learned arbitrator to consider the additional documents filed by the petitioner in Annexures A1 to A60. The issue has been dealt with by the learned arbitrator thus[6]:-

> *"The Respondent has, however, alleged that the Claimant had violated the implicit understanding by entering into various arrangements with the customers and suppliers of LOX and LIN including customers like PGI Chandigarh, Surya Pharmaceuticals Ltd. etc. The Respondent stated they had previously procured LOX and LIN from the Respondent company and that the Claimant had adopted predatory pricing so as to attract such customers of the Respondent. According to the Respondent owing to the predatory pricing and solicitation by the Claimant there was considerable reduction of orders from those customers to the Respondent.* ***On predatory pricing and to establish poaching of customers, the Respondent, sought to produce Annexure A 1 to A60 documents alongwith an Application dated 20.10.2015.***
>
> *The Application was opposed by the Claimant vide its objection dated 26.11.2015 stating in none of the 60 documents there was any proof to show the Claimant had altered the terms of C1 and C2 and tinkered with the price formula agreed to by the parties. The Claimant also stated those documents would not show that the Claimant had poached the customers of the Respondent.* ***The Respondent, in order to prove those documents wanted to examine two witnesses one Mr. Pankaj Chaturvedi and Mr. Saurabh***

[6] Page 25-27 of the award in annexure-1 of the petitioner's list of documents.

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> ***Jain. Affidavit by way of evidence of those witnesses were also filed. Through Mr. Pankaj Chaturvedi, the Respondent wanted to prove RW1-1 to 17 and through Mr. Saurabh Jain, the Respondent wanted to provide RW2-1 to RW2-51. The Respondent has not taken any steps to examine both the witnesses and hence not proved Annexure A-1 to Annexure A-60 referred to in the Application dated 20.10.2015 filed by the Respondent.***
> *The Apex Court in Bareilly Electricity Supply Co Ltd v. Workmen (1971) 1 LLJ 407 while dealing with an order of the Industrial Tribunal, held that even though the Evidence Act as such is not strictly applicable to such Tribunals where issues are seriously contested, and have to be established and proved, the requirements relating to proof cannot be dispensed with. Following that the Bombay High Court in Rashmi Housing Pvt Ltd vs. Pan India Infraprojects Pvt Ltd (2015) 2 Born CR 697 held while dealing with an Arbitration Award, that it is bound to consider the principles of Evidence Act and CPC, and has to follow the principles of natural justice.* ***In my view, a document which is disputed, by the other party if not proved, cannot be considered by the Arbitrator, to be on record or as a piece of evidence.*** *Reference may also be made to the judgment of the Bombay High Court in Pradyuman Kumar Sharma vs. Jay Sagar M. Sancheti (2013) 5 Mah CJ 86.*
> ***The Respondent has, therefore, not proved that the Claimant had adopted predatory pricing and poached the customers of the Respondent and that there was an implied understanding to that effect. Issue No.4 is therefore decided in favour of the Claimant.***"[7]

4. Notice was issued in this petition on 09.10.2018, when this Court recorded the following contentions: **-**

> *"6. Mr. Sibal says that apart from anything else, the impugned Award is flawed for the reason that the documents marked as Annexure A-1 to A-60 have been excluded from consideration by the learned Arbitrator only on the ground that the petitioner/counterclaimant had not formally proved the said documents.*
> *6.1 It is the learned senior counsel's submission that a perusal of procedural order dated 25.01.2016, passed by the erstwhile*

[7] Emphasis supplied.

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Arbitrator, who unfortunately expired during the course of the proceedings, would show that it was agreed that no formal proof of Annexures A-1 to A-60, which are essentially e-mails, would be necessary.
7. It appears that the learned Arbitrator, who succeeded in the matter, refused to rely upon those e-mails, which were not formally proved by the petitioner/counter claimant."

B. Contentions of the parties

5. In the present application, the respondent/applicant supports the view taken in the impugned award, and submits that the additional documents sought to be relied upon were throughout disputed by it. It is urged that the order of the learned arbitrator dated 25.01.2016 indicates a voluntary decision to forego oral evidence, but does not imply that the contents of the documents were *per se* to be taken as proved.

6. Without prejudice to these contentions, the respondent seeks to invoke Section 34(4) of the Act, by which the tribunal can be given an opportunity to resume proceedings and eliminate the ground of challenge. The petitioner has filed a reply to the application disputing the factual contentions of the respondent.

7. The parties have joined issue as to whether Section 34(4) of the Act is applicable in the present situation. The provision reads as follows:

"34 Application for setting aside arbitral award: -

xxxx xxxx xxxx

4. On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the

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arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

8. Mr. Akhil Sibal, learned Senior Counsel for the respondent/applicant, submitted that a proper reading of the award would show that the learned arbitrator has disregarded the documents in question, not merely on the ground of lack of formal proof, but on the ground that they did not establish the case which the petitioner set out to prove. According to him, the documents included 33 e-mails and several other documents, the contents of which were disputed by the respondent even before the learned arbitrator. In this context, the order of the learned arbitrator dated 25.01.2016 ought not to be read as a ruling on the admissibility of the documents, their relevance or their contents, but confined to the question of formal proof of the e-mails, for example by filing of certificate under Section 65B of the Indian Evidence Act, 1873.

9. Mr. Sibal submitted that, even if the petitioner's contentions are taken to be correct, the impugned award suffers from a curable ambiguity and an effort ought to be made to resolve the ambiguity at the hands of the learned arbitrator, rather than to adjudicate it as a ground under Section 34 of the Act. He cited the following judgments in support of the application:

a. *Dyna Technologies Pvt. Ltd.* v. *Crompton Greaves Ltd.*[8];

b. *Kinnari Mullick* v. *Ghanshyam Das Damani*[9];

c. *Som Datt Builders Ltd. v. State of Kerala*[10];

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[8] (2019) 20 SCC 1.

[9] (2018) 11 SCC 328.

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d. UEM India Pvt. Ltd. v. ONGC Ltd.[11]*;and*

e. *M/s MMTC* v. *Vicnivass Agency and Anr.* [12]

10. Mr. Jayant Bhushan, learned Senior Counsel for the petitioner, disputed Mr. Sibal's interpretation of the award. He submitted that the learned arbitrator clearly overlooked the orders of the erstwhile arbitrator while declining to take Annexures A-1 to A-60 on record at all. In these circumstances, Mr. Bhushan submitted that the matter lies outside the scope of Section 34(4) of the Act as the learned arbitrator would have to reconsider the award altogether in light of the documents in question. In support of this contention, Mr. Bhushan relied upon the following judgments:

a. I-Pay Clearing Services Private Ltd. vs. ICICI Bank Ltd.[13]*,*

b. *Radha Chemicals vs. Union of India*[14],

c. *Bentwood Seating System Ltd. vs. Airport Authority of India*[15],

d. *Coal India Limited vs. Hyderabad Industries Ltd.*[16], and

e. BTP Structural (I) Pvt. Ltd. vs. Bharat Petroleum Corp. Ltd.[17]

C. Analysis

(a) Judgments on the scope of Section 34(4) of the Act

11. The scope of Section 34(4) of the Act must be examined in the light of the authorities cited by learned Senior Counsel for the parties.

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[10] (2009) 10 SCC 259.
[11] 2019 SCC OnLine Del 7167.
[12] 2008 SCC OnLine Mad 584.
[13] 2022 SCC OnLine SC 4.
[14] Order dated 10.10.2018 in Civil Appeal 10386 of 2018.
[15] 2021 SCC OnLine Del 3989.
[16] 2021 SCC OnLine Cal 518.
[17] 2012 SCC OnLine Bom 639.

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The following judgments of the Supreme Court (enumerated here in chronological order) deal with it in some detail:

a. Mr. Sibal relied upon the decision of the Supreme Court in *Som Datt Builders Ltd.*[18], where the Court found the impugned award to be entirely devoid of reasons, and remitted it back to the Arbitral Tribunal for recording reasons:

> *"25. The requirement of reasons in support of the award under Section 31(3) is not an empty formality. It guarantees fair and legitimate consideration of the controversy by the Arbitral Tribunal. It is true that the Arbitral Tribunal is not expected to write a judgment like a court nor is it expected to give elaborate and detailed reasons in support of its finding(s) but mere noticing the submissions of the parties or reference to documents is no substitute for reasons which the Arbitral Tribunal is obliged to give.* ***Howsoever brief these may be, reasons must be indicated in the award as that would reflect the thought process leading to a particular conclusion.*** *To satisfy the requirement of Section 31(3), the reasons must be stated by the Arbitral Tribunal upon which the award is based; want of reasons would make such award legally flawed.*
>
> ***26.*** *In what we have discussed above, it cannot be said that the High Court was wrong in observing that no reasons have been assigned by the Arbitral Tribunal as to whether the period of completion extended by the employer for 18½ months was due to reasons not attributable to the claimant.* ***However, in our view, the High Court ought to have given the Arbitral Tribunal an opportunity to give reasons.*** *This course is available under Section 34(4) of the Act which reads thus:*
>
> *xxxx xxxx xxxx."*[19]

b. In *Kinnari Mullick*[20], the Supreme Court held that Section 34(4) of the Act cannot be invoked after the arbitral award has already been set aside. On the scope of Section 34(4) of the Act, the

[18] Supra (note 10).
[19] Emphasis supplied.
[20] Supra (note 9).

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Court clarified that it does not include the power to remand the award to the arbitral tribunal, except for the purpose of rectifying a curable deficiency, that too upon an application by a party:

> *"15. ... **The quintessence for exercising power under this provision is that the arbitral award has not been set aside.** Further, the challenge to the said award has been set up under Section 34 about the **deficiencies in the arbitral award which may be curable** by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the arbitral award. No power has been invested by Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in sub-section (4) of Section 34..."*[21]

c. In *Radha Chemicals*[22], following *Kinnari Mullick*[23], the Supreme Court reiterated that the Court under Section 34 of the Act has no power to remand a matter to the arbitrator for a fresh decision.

d. In *Dyna Technologies Pvt. Ltd.*[24], while holding that an unduly literal reading of the award is unnecessary, the Supreme Court identified three characteristics of a reasoned order, *viz.* that it must be proper, intelligible and adequate. If the arbitral award does not provide any reasoning or has some gap in the reasoning or otherwise, which can be cured so as to avoid a challenge, the Court held that recourse may be had to Section 34 (4) of the Act:

[21] Emphasis supplied.
[22] Supra (note 14).
[23] Supra (note 9).
[24] Supra (note 8).

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*"37. **<u>In case of absence of reasoning the utility has been provided under Section 34(4) of the Arbitration Act to cure such defects.</u>** When there is complete perversity in the reasoning then only it can be challenged under the provisions of Section 34 of the Arbitration Act. The power vested under Section 34(4) of the Arbitration Act to cure defects can be utilised in cases **<u>where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34 of the Arbitration Act. However, in this case such remand to the Tribunal would not be beneficial as this case has taken more than 25 years for its adjudication.</u>** It is in this state of affairs that we lament that the purpose of arbitration as an effective and expeditious forum itself stands effaced."*[25]

e. The most recent judgment of the Supreme Court cited by learned counsel for the parties is *I-Pay*[26], wherein the Court has considered its earlier judgments in *Som Datt*[27], *Kinnari Mullick*[28] and *Dyna Technologies*[29]. The Supreme Court clarified that Section 34(4) of the Act can be invoked to enable the tribunal to provide reasoning or fill a lacuna in the reasoning in support of a finding rendered in the award, but not to render a finding which is altogether missed in the award. This decision also makes it clear that the power under Section 34(4) of the Act is a discretionary power of the Court, and the Court is obliged to consider whether it is appropriate, in the facts and circumstances of each case, to exercise the said jurisdiction. The Supreme Court thus observed:-

*"39. **<u>Further, Section 34(4) of the Act itself makes it clear that it is the discretion vested with the Court for remitting the matter to</u>***

[25] Emphasis supplied.
[26] Supra (note 13).
[27] Supra (note 10).
[28] Supra (note 9).
[29] Supra (note 8).

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Arbitral Tribunal to give an opportunity to resume the proceedings or not. *The words "where it is appropriate" itself indicate that it is the discretion to be exercised by the Court, to remit the matter when requested by a party. When application is filed under Section 34(4) of the Act, the same is to be considered keeping in mind the grounds raised in the application under Section 34(1) of the Act by the party, who has questioned the award of the Arbitral Tribunal and the grounds raised in the application filed under Section 34(4) of the Act and the reply thereto.*

40. *Merely because an application is filed under Section 34(4) of the Act by a party, it is not always obligatory on the part of the Court to remit the matter to Arbitral Tribunal.* ***The discretionary power conferred under Section 34(4) of the Act, is to be exercised where there is inadequate reasoning or to fill up the gaps in the reasoning, in support of the findings which are already recorded in the award.***

41. Under the guise of additional reasons and filling up the gaps in the reasoning, no award can be remitted to the arbitrator, where there are no findings on the contentious issues in the award. ***If there are no findings on the contentious issues in the award or if any findings are recorded ignoring the material evidence on record, the same are acceptable grounds for setting aside the award itself.*** *Under the guise of either additional reasons or filling up the gaps in the reasoning, the power conferred on the Court cannot be relegated to the arbitrator. In absence of any finding on contentious issue, no amount of reasons can cure the defect in the award.*

42. A harmonious reading of Sections 31, 34(1), 34(2-A) and 34(4) of the Arbitration and Conciliation Act, 1996, make it clear that in appropriate cases, on the request made by a party, Court can give an opportunity to the arbitrator to resume the arbitral proceedings for giving reasons or to fill up the gaps in the reasoning in support of a finding, which is already rendered in the award. ***But at the same time, when it prima facie appears that there is a patent illegality in the award itself, by not recording a finding on a contentious issue, in such cases, Court may not accede to the request of a party for giving an opportunity to the Arbitral Tribunal to resume the arbitral proceedings.*** *"*[30]

[30] Emphasis supplied.

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12. Two judgments of this Court have also been relied upon by learned Senior Counsel for the parties. In *UEM India Pvt. Ltd.*[31], relied upon by Mr. Sibal, a coordinate Bench of this Court applied Section 34(4) of the Act in view of an ambiguity as to whether the tribunal had awarded the amount of performance bank guarantee in favour of the respondent in addition to the liquidated damages. The decision of the Division Bench in *Bentwood*[32], relied upon by Mr. Bhushan, concerned a challenge to a judgment setting aside an award. One of the grounds raised by the appellant was that Section 34(4) of the Act ought to have been resorted to. The Division Bench considered the judgments in *Kinnari Mullick*[33] and *Dyna Technologies*[34] and held as follows:

> *"17. We are in agreement with the observations made by the learned Single Judge. The plea of grant of specific performance of the contract was dependent on the outcome of the defence raised by the respondent that the Purchase Order/contract itself was vitiated by fraud. This defence has clearly not been adjudicated upon by the learned Arbitrator. It is not the case of merely not recording reasons for his finding, but one where there is no finding by the learned Arbitrator on this issue.* ***It cannot also be termed as a deficiency in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take measures which can eliminate the ground for setting aside the Arbitral Award, which was stipulated as one of the conditions for exercise of power under Section 34(4) of the Act in Kinnari Mullick (supra). A finding on this issue may in fact, bring about a total change in the Award.***
>
> *18.* ***The submission of the learned counsel for the appellant that the e-mails relied upon by the respondent in support of its submission of fraud were even otherwise not admissible, cannot be considered by this Court in its powers under Section 37 of the Act and could not even have been considered by the learned***

[31] Supra (note 11).
[32] Supra (note 15).
[33] Supra (note 9).
[34] Supra (note 8).

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> ***Single Judge in exercise of its powers under Section 34 of the Act.*** *These are submissions which had to be considered by the learned Arbitrator in the first instance."* [35]

13. Three judgments of the other High Courts have also been cited before me:

a. Mr. Sibal relied upon the judgment of the Madras High Court in *M/s MMTC*[36], which held as follows: -

> *"25. ...The terms "to take such other action" and "in the opinion of the arbitral tribunal" appearing in Section 34 (4) give a clear indication that sufficient elbow space is available to the arbitral tribunal to do whatever is necessary in its opinion to eliminate the grounds. There is no restriction placed by the Act upon the arbitral tribunal as to what it should do under Section 34 (4). The arbitral tribunal can have a free play, for after all, the purpose of such an exercise is to eliminate the grounds for setting aside the award. It appears from the language employed that the arbitral tribunal may even refuse to do anything further and leave it to the Court to decide the matter on its own merits under Section 34 (2), since Section 34(4) is only an enabling provision and not strictly an order of remand, so as to compel the Arbitrator to do something. This is why Section 34 (4) uses the expression "to give the arbitral tribunal an opportunity". The opportunity may or may not be made use of. If the tribunal chooses not to make use of the opportunity so afforded, then the Court will have to consider the application under Section 34(1), in tune with the parameters laid down under Section 34 (2). If Section 34(4) is understood in such a perspective, there is no difficulty in coming to the conclusion that the arbitral tribunal may also entertain additional evidence after resumption of the proceedings, since there are no fetters under Section 34 (4). All that is required under Section 34 (4) is the subjective satisfaction of the arbitral tribunal that the venture undertaken by it would eliminate the grounds for setting aside the award."*

b. Mr. Bhushan, on the other hand, placed a judgment of the Calcutta High Court in *Coal India Limited*[37], wherein the

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[35] Emphasis supplied.
[36] Supra (note 12).
[37] Supra (note 16).

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provision has been given a limited interpretation after considering the judgments of the Supreme Court in *Kinnari Mullick*[38] and *Dyna Technologies*[39], as well as the judgment of the Madras High Court in *M/s MMTC*[40]. The Court also cited the *UNCITRAL Model Laws* to hold that the Tribunal cannot be permitted to *"reconsider"* the award under Section 34(4) of the Act, even for the purpose of eliminating the ground of challenge.

c. In *BTP Structural (I) Pvt. Ltd.*[41], the Bombay High Court came to the conclusion that an award had been passed in breach of the principles of natural justice, fair play and equity. The Court held that an award which is *void ab initio* for such reasons cannot be remitted for reconsideration and/or rehearing under Section 34(4) of the Act.

(b) Application to the facts of the present case

14. Applying these principles to the facts of the present case, I am of the view that it would not be appropriate to take recourse to the provision of Section 34(4) of the Act. The grievance of the petitioner is that the learned arbitrator has rendered a finding on Issue No.4, without considering a material piece of evidence, being Annexures A-1 to A-60. The impugned award holds that these documents could not be considered to be on record as a piece of evidence. This is thus not a case where the learned arbitrator has rendered a finding, but without

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[38] Supra (note 9).
[39] Supra (note 8).
[40] Supra (note 12).
[41] Supra (note 17).

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any or adequate reasons, as indicated in *Dyna Technologies*[42] *and Som Datt Builders*[43]. It is instead a case where the grievance concerns non-consideration of material evidence. If the matter is taken back to the learned arbitrator on this point, the petitioner's ground of challenge can be eliminated only if the learned arbitrator considers the documents he failed to consider. This in itself is not permitted under Section 34(4) of the Act, as is abundantly clear from the judgments in *I-Pay*[44], *Bentwood*[45], *Coal India Pvt. Ltd.*[46] *and BTP Structural*[47].

15. In fact, such a course would also fall foul of the principle that the learned arbitrator cannot reconsider his conclusion, or that Section 34(4) of the Act cannot be resorted to in a situation where the award itself may change as a result. It would be meaningless to enable the learned arbitrator to consider material which he failed to consider at the first instance, while imposing the fetter that he must maintain the conclusion which he then reached. To permit recourse to Section 34(4) of the Act in such a case is akin to a remand, prohibited by *Kinnari Mullick*[48] and *Radha Chemicals*[49], but even less effective, as it is a remand without the power to reach a different conclusion.

16. Mr. Sibal, in the course of arguments, drew my attention to the fact that in paragraph 37 of *Dyna Technologies*[50], the Court emphasized that Section 34(4) of the Act can be utilized *"in cases*

[42] Supra (note 8).
[43] Supra (note 10).
[44] Supra (note 13).
[45] Supra (note 15).
[46] Supra (note 16).
[47] Supra (note 17).
[48] Supra (note 9).
[49] Supra (note 14).
[50] Supra (note 8).

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where the arbitral award does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects." He suggested that the Supreme Court has left open the possibility of other grounds in which Section 34(4) of the Act can be invoked. I am afraid this reasoning does not commend to me. *Dyna Technologies*[51] has been considered by the Supreme Court in *I-Pay*[52] and by the Division Bench of this Court in *Bentwood*[53]. Both the said judgments clearly indicate that consideration of fresh material does not fall within the grounds available. Mr. Sibal sought to distinguish these judgments on the ground that, in both these cases, the award did not contain any finding on the issue in question. He submitted that it is for this reason that recourse to Section 34(4) of the Act was declined. While that may factually be the position in those cases, I do not see a distinction on point of principle in the present case. As stated above, consideration of the material left out at the first instance would be effective only if the learned arbitrator had the jurisdiction to reconsider or alter the ultimate award. As such power is not available to the learned arbitrator, Section 34(4) of the Act is not attracted.

17. For the same reasons, I am unable to accept Mr. Sibal's contention that judgments in *BTP Structural*[54] and *Coal India Limited*[55] turn principally on a fact-intensive analysis - in the case of

[51] Ibid.
[52] Supra (note 13).
[53] Supra (note 15).
[54] Supra (note 17).
[55] Supra (note 16).

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BTP Structural[56], that the award was vitiated by breach of natural justice, and in the case of *Coal India Limited*[57], that the tribunal would be required to rehear the case due to lapse of time. These fact-based conclusions do not take away from the analysis in the said judgments with regard to the scope and effect of Section 34(4) of the Act.

18. I am also not persuaded by Mr. Sibal's reliance upon the decisions of this Court in *UEM India*[58] and of the Madras High Court in *M/s MMTC*[59]. In *UEM India*[60], the tribunal was only required to make a clarification with regard to the relief granted. While the Madras High Court in *M/s MMTC*[61] appears to have taken a more expansive view, even this judgment makes it clear that the ground for setting aside the award must be capable of being eliminated and that the order is discretionary in nature.

19. Having regard to all the factors enumerated above, and most particularly to the fact that Section 34(4) cannot be used to enable an arbitral tribunal to reopen the conclusion reached, I am of the view that the exercise of the said power in the present case would not be appropriate.

D. Conclusion

20. For the aforesaid reasons, the application is dismissed. Parties are left to bear their own costs.

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[56] Supra (note 17).
[57] Supra (note 16).
[58] Supra (note 11).
[59] Supra (note 12).
[60] Supra (note 11).
[61] Supra (note 12).

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List on 18.07.2023.

PRATEEK JALAN, J.

March 24, 2023
'Bhupi/vp/Ananya'/

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